IN THE SUPREME COURT OF FLORIDA

NO. SC02-667

KEVIN DON FOSTER

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF, FOR WRIT OF PROHIBITION, AND FOR WRIT OF MANDAMUS

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STATEMENT OF FACTS

Petitioner, Kevin Don Foster, is a death row inmate. He was tried and convicted of the first degree murder of Mark Schwebes and this Court affirmed the judgment and sentence of death in Foster v. State, 778 So. 2d 906 (Fla. 2000). On or about August 1, 2002, the State Attorney's Office filed an information charging Kevin Don Foster and Ruby Catherine Foster with conspiracy to commit murder of Christopher Burnett, Thomas Torrone and Bradley Young (Respondent's Ex. 1). Foster and his post-conviction counsel filed a Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend on or about September 27, 2001 (Respondent's Ex. 2).

In February of 2002, Foster filed Defendant's Motions to Disqualify Judge and Twentieth Judicial Circuit asserting that among those listed on a "hit list" were Judge Isaac Anderson, prosecutors, investigators, law enforcement personnel and attorneys from the Public Defender's Office. He claimed that judges and government attorneys may become material witnesses against him at his conspiracy trial and "Even if those people are not called, they are biased against him because of these accusations" (Petitioner's Appendix 2, P.3).

The state filed a Motion to Strike Defendant's Motion to Disqualify Judge and Twentieth Judicial Circuit (Petitioner's

Appendix 4) and the lower court entered its Order Denying Defendant's Motion to Disqualify Judge on February 21, 2002 (Petitioner's Appendix 1).

ARGUMENT

Petitioner's Motion to Disqualify Judge Anderson and other judges of the Twentieth Judicial Circuit, as well as any request to disqualify the State Attorney's Office for the Twentieth Judicial Circuit from participating in Foster's motion for post-conviction relief on his capital judgment and sentence should be denied.

(A) Judge Anderson and other judges of the Twentieth Judicial Circuit -

The lower court entered its Order Denying Defendant's Motion to Disqualify Judge on February 21, 2002, finding that the motion to disqualify was legally insufficient because:

1. The motion was untimely;

2. Subjective fears are insufficient as a matter of law to support disqualification; and

3. A Court may not be provoked into disqualification.

1. The motion was untimely - as noted in the judges order the instant motion was untimely. See Foley v. Fleet, 644 So. 2d 551 (Fla. 4DCA 1994)(motion for disqualification untimely where not filed within 10 days after the grounds for disqualification

were made known to petitioner as required by Florida Rule of Judicial Administration 2.160(e)(1994)); Waterhouse v. State, 792 So. 2d 1176, 1193 (Fla. 2001)(defense counsel should have been aware of judge's post-trial statement about defendant made to Parole and Probation Commission and if recusal was indeed warranted that was the time to have requested such relief); Asay v. State, 769 So. 2d 974, 980 (Fla. 2000)(time for defendant to file motion to disqualify trial judge from presiding over post-conviction proceedings began to run at time remarks were made during the original trial); Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997)(untimely request to disqualify judge who presided over first trial and was appointed to conduct penalty trial on remand); Schwab v. State, _So. 2d_, 27 Fla. L. Weekly S275 (Fla. 2002).

According to petitioner's pleadings, an arrest warrant was issued and both Kevin Foster and Ruby Foster were charged with conspiracy to commit murder on July 20, 2000. Post-conviction counsel Backhus filed her Notice of Appearance on or about July 10, 2001 (Respondent's Ex. 3), filed a Motion to Vacate Judgment and Sentence on or about September 26, 2001 (Respondent's Ex. 2) and five months later in February of 2002, filed Defendant's Motion to Disqualify Judge and Twentieth Judicial Circuit (Petitioner's Appendix 2). Any contention that post-conviction

counsel are from out of town and not aware of the information until public records disclosure is belied by the fact that Mr. Foster is the party to this action and was well aware of it.

2. The lower court also ruled that subjective fears are insufficient as a matter of law to support disqualification. See Jernigan v. State, (Fla. 1DCA 1992)(factually unsupported theory that that judge was prejudiced against all child abuse defendants was legally insufficient); P.B. Johnson v. State, 769 So. 2d 990, 996 (Fla. 2000)(The fact that Judge Bentley sentenced a jailhouse informant who testified against Johnson at trial did not reasonably demonstrate any predisposition in the mind of Judge Bentley); Asay v. State, 769 So. 2d 974, 980-981 (Fla. 2000)(A motion to disqualify a judge must be well founded and contain facts germane to the judge's undue bias, prejudice or sympathy. Sheer speculation is insufficient); Thompson v. State, 759 So. 2d 650, 569 (Fla. 2000)(the fact that a judge has ruled adversely to the party in the past does not constitute a legally sufficient ground for a motion to disqualify nor does a court's questioning of parties as to their position constitute grounds for disqualification).

In the instant case petitioner - both in the lower court and here - does not refer to any words or conduct by Judge Anderson to suggest any undue bias, but rather refers to his own conduct,

i.e. that since he has been charged in an accusatory pleading with conspiracy to kill a number of people, they must have a bias toward him. This is sheer speculation and insufficient.

3. A Court may not be provoked into disqualification. In Davis v. State, 692 So. 2d 943, 945 (Fla. 5DCA 1997), the defendant appealed an unsuccessful motion to recuse the trial court prior to re-sentencing. The Court opined:

> "The basis for his motion was not anything said or done by the trial judge that would indicate bias, but rather was based on reports made known to the trial court that Davis may have threatened to do the judge harm as well as a threat to do harm to Davis' former wife. Certainly if a judge believed that Davis was in a position to carry out the threats, he might well feel concern. There is no indication that the judge in this case was at all concerned. Nothing that the judge said or did is cited to us which shows bias. A defendant should not be able to so easily dispose of a judge by merely threatening him or her. We find no error in the judge's refusal to recuse in this case."
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> (emphasis supplied)[1]

Petitioner argues that it has not been alleged that the purpose of Foster's threats was to create a situation "where the goal... was to remove Judge Anderson [from] his case". Foster's

[1] Since as petitioner reminds us Judge Anderson was not his judge at the time he made his threats - rather it was this court during the pending of his direct appeal, that further reflects Judge Anderson's lack of inordinate concern and his ability to adjudicate further matters without bias.

reasoning continues, that since the case was pending on direct appeal to this Court if the goal was removal of the judge from the case "then the most logical choice would be to direct the threats at the judges who had jurisdiction over the case" (Petition, P. 10). Respondent will assume arguendo that Foster's motive in the conspiracy to kill was not for the purpose of obtaining a different judge to handle his post-conviction litigation (but merely to kill those who played a role in the investigation, arrest and trial in the capital case). But the effect of his conduct is a similar removal of Judge Anderson from performing his judicial functions. Under Foster's peculiar logic, if his threat had been directed at and toward this Court - or indeed all judges - then it would be required that this Court and/or all judges would have to disqualify themselves on the basis of his assertion of a belief of bias when the plan did not reach fruition. The legal system could not function if petitioner's logic were accepted that threats to the judiciary after adverse rulings were to be followed by automatic disqualification.[2]

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[2] Petitioner's assertion of a concern that Judge Anderson may be called as a material witness in the upcoming trial (Petition, P. 6) seems far-fetched. The information that has been filed does not mention Judge Anderson as one of the objects of the conspiracy to kill. It is Respondent's understanding that Judge Anderson has not been listed as a prosecution witness and it is difficult to imagine why it would be necessary to call him as a

B. The State Attorney's Office -

Petitioner also apparently seeks the removal and disqualification of the entire circuit, asserting that:

> "...circuit court judges in the Twentieth Judicial Circuit, and government attorneys, may become material witnesses against him at his conspiracy trial. Even if these people are not called, they are biased against him because of these accusations leveled by Mr. Greenhill and the state attorneys for the Twentieth Judicial Circuit. Therefore, the entire circuit should be disqualified."
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> (Petition, P. 5)

To the extent Foster seeks an order of disqualification of the state attorney's office for the Twentieth Judicial Circuit from this Court, that request is meritless and should be denied. Neither Mr. Foster nor any other criminal defendant has a general entitlement that the elected state attorney of the circuit - a constitutional officer - be removed from the lawful performance of his duties i.e. prosecuting crimes in the circuit where the people have elected him.

Mr. Foster does not have a right to deprive the citizenry of the most knowledgeable and experienced staff and to foist his

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witness.

Petitioner also asserts that Judge Carlin will preside over the pending conspiracy charge (Petition, P. 6). Obviously, if a judge within the circuit can preside at the conspiracy trial it refutes Foster's allegation of a fear "that Judge Anderson and his colleagues in the Twentieth Judicial Circuit harbor a bias against him" (Petition, P. 6).

case on another office unfamiliar with the facts and perhaps overworked on other cases.

As stated in Kearse v. State, 770 So. 2d 1119, 1129 (Fla. 2000):

> "Disqualification of a state attorney is proper only when specific prejudice is demonstrated. See Farina v. State, 679 So. 2d 1151, 1157 (Fla. 1996), receded from on other grounds by Franqui v. State, 679 So. 2d 1312, 1320 (Fla. 1997); State v. Clausell, 474 So. 2d 1189, 1190 (Fla. 1985). Furthermore, "actual prejudice is something more than the mere appearance of impropriety." Meggs v. McClure, 538 So. 2d 518, 519 (Fla. 1st DCA 1989)."

See also Downs v. Moore, 801 so. 2d 906, 914 (Fla. 2001)(same)(fact that Downs initiated a civil suit against the state attorney's office to obtain copies of polygraph test results and documents no longer existed did not indicate state was biased or prejudiced against him); Farina v. State, 680 So. 2d 392 (Fla. 1996)(Disqualification of state attorney's office not required in capital murder case after state attorney asked court clerk to assign case to another division in which a particular judge was only sitting judge. Defendant was not able to show prejudice as judge that state attorney may have hoped to try case did not preside); Bogle v. State, 655 So. 2d 1103 (Fla. 1995)(Disqualification of entire state attorney's office is unnecessary when the disqualified attorney does not provide

prejudicial information and does not personally assist in prosecution of charge); Schwab v. State, 636 So. 2d 3 (Fla. 1994); State v. Fitzpatrick, 464 So. 2d 1185 (Fla. 1985)(appellate court erred in requiring disqualification of entire state attorney's office for the Seventh Judicial Circuit on grounds that confidential communications relating to charges against defendant had been made to an attorney subsequently hired as an assistant state attorney in that office); State v. Cote, 538 So. 2d 1356 (Fla. 5DCA 1989)(mere appearance of impropriety was insufficient to require disqualification of entire state attorney's office); Brown v. State, 455 So. 2d 583 (Fla. 5DCA 1984)(other members of a state attorney's office are not disqualified from prosecuting a criminal case merely because one prosecuting attorney in the office is alleged victim and a state's witness in the case).

Foster has not, and cannot, satisfy the stringent requirement of establishing actual prejudice by the State Attorney's Office of the Twentieth Judicial Circuit in handling the instant motion for post-conviction relief (or the pending conspiracy charge). That he believes prosecutors may be unhappy with him in light of the allegations in the conspiracy charge is of no moment. Other defendants in other cases may feel prosecutors have a bias regarding certain offenses such as

murder or child abuse. It is irrelevant. Prosecutors are professionals who try cases when presented sufficient evidence to warrant prosecution. The instant circumstance that Foster has been charged with conspiracy to kill various people including a judge, witnesses, a former prosecutor and law enforcement personnel is simply ordinary grist for the mill to a prosecutor. Foster's effort to displace the state attorney's office in the prosecution of his post-conviction claims or otherwise exercise a veto and demand that the case be submitted to another office totally unfamiliar with his case should be rejected. Respondent would respectfully submit that unwarranted substitutions do carry a societal cost. The public's confidence in the judicial system and in their elected officials is undermined when a duly-elected state officer and his staff are not permitted to do their work but must instead transfer their caseload to other overworked offices unfamiliar with the case for no legitimate reason, other than the imagined and speculative concerns submitted by petitioner.

CONCLUSION

Based on the foregoing arguments and authorities, the Petition for Writ of Prohibition and Request for Additional Relief should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Terri L. Backhus, Special Assistant CCRC - South, Office of the Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this _____ day of April, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R.

App. P. 9.210(a)(2).

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COUNSEL FOR RESPONDENT